

**Vulnerability at Work:
Legal and Policy Issues in
the New Economy**

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Executive Summary

Increasing vulnerability and insecurity at work is a feature of the new economy. In general, workers now have less job security and less power at work; many have less secure sources of income; increasing numbers of workers labour in inadequately protected work environments. In addition, there are growing numbers of workers who are especially vulnerable, because they generate inadequate income; because they are engaged in marginal self-employment and are not legally recognized as employees; because their work is either inadequately protected and regulated or falls outside of the regulatory net governing work altogether; because they have conditions or obligations that impinge on their capacity to participate in the labour market; and/or because they are subject to particular forms of discrimination and disadvantage at work.

These phenomena are inseparable from the transformation of work in the new economy and the dominant trends in respect of the regulation of economic activity. This report discusses the main trends in governance and regulation that may affect the vulnerability of workers, the assumptions and concepts that animate those trends, key issues and debates that bear attention, and questions that should be at the forefront when policy and regulatory design in the workplace is at issue.

Part I discusses the role of law in vulnerability at work. It suggests that, rather than an inevitable feature of the new economy, vulnerability at work is related in important ways to the legal regimes that structure work. Because legal rules and institutions legitimize workplace norms and allocate resources, power, risk and responsibility among different groups and institutions, they are implicated in both the production of and the response to vulnerability at work.

The norms and assumptions undergirding the current regimes governing work have been shaken by transformations in the geography of production and the regulatory reach of the state; the organization of work; and the identity of the worker. The result is a regulatory gap leaving workplace rules and standards less functional and responsive to the needs of workers.

As described in Part II, these changes have been accompanied by the rise of good governance norms in the global economy. Although often identified with global economic integration, the promotion of good governance should be understood as a distinct institutional project that aims, *inter alia*, to facilitate transactions and investments and promote growth and efficiency, largely through transformations in the role of the state and greater reliance on market forces and private and civil society actors. As a regulative ideal, good governance now plays a powerful role in contemporary policy and regulatory debates. The final part suggests that, notwithstanding the rise of a normative market model associated with good governance, there remains a great deal of variation in the institutions of market societies and intense debate over their contribution to growth. The focus on efficient regulation has important implications for workers, as the rules and policies associated with the promotion of efficiency contain embedded distributional choices and often merely shift costs in ways that contribute to the production of vulnerability at work.

Part III discusses the dominant regulatory trends in labour markets, labour market flexibility and the protection of 'core' labour rights and attempts to analyze the ways that they are shifting the premises and objectives of labour market regulation. On the assumption that many labour market rules and standards and job protections are inefficient and dysfunctional in a knowledge-based global economy, flexibility advocates propose that labour markets be 'deregulated' and workers become labour market entrepreneurs through continuous upgrading of skills and adaptation to a constantly changing labour market. In practice, labour market deregulation

takes active and passive forms; the result in both cases is the exclusion of increasing numbers of workers from the labour market rules and protections available to employees.

There is also a new emphasis on protecting 'core' workers' rights associated with the introduction of human rights norms into the regulatory debate around work. However, basic anti-discrimination and associational rights aside, labour market regulation now tends to be conceptualized as a question of *economic policy* rather than a question of the worker *rights and entitlements*; there is also less recognition of the conflict interest between workers and employers and the role of power in the workplace and the employment contract.

Current governance and flexibility agendas place great emphasis on human capital in labour market policy. However, the regulatory and policy changes associated with a human capital growth strategy remain uncertain and contested, as are the assumptions and effects of greater labour market flexibility. In practice, a broad range of responses may be needed to actually operationalize a knowledge-based economy in which most people can expect to ensure their economic security and well-being through labour market participation

Among the key sites of concern for vulnerable workers are the concept of the employee and access to workplace representation. Rethinking the basis on which economic security and protection to workers is delivered is crucial now that job tenure is less secure. Attention to representation is crucial both to empower vulnerable workers in respect of their employees and to foster greater attention to the interests of workers in the formulation of rules and policies at work. The discussion closes by considering what might be at stake in the shift toward process and participation rights, decentralization and the de-emphasis on substantive worker rights.

Part IV considers the ways in which vulnerability at work intersects with equality concerns, suggesting that regulatory prescriptions focused on economic efficiency narrowly understood

will be incapable of responding to a variety of forms of workplace vulnerability and disadvantage that create vulnerability at work. While policies and rules that ameliorate workplace discrimination and disadvantage may overlap with those that promote labour market participation and the accumulation of human capital, it is unsafe to assume that social concerns can now be collapsed into economic concerns. There may be conflicts at the level of institutional design, as equality-promoting rules are often perceived to be inefficient. Moreover, neither markets nor human capital strategies 'solve' for problems of systemic discrimination on their own.

In order to probe what is at stake in these regulatory debates, the discussion takes up the feminization of the workplace, suggesting that it raises a distinct set of issues around both efficiency and equality that must be addressed now that the workplace is no longer predominantly male. Much of the disadvantage of women in the labour market can be attributed to the fact that the costs responsibilities for unpaid or 'reproductive' labour are unequally assumed by men and women and externalized from the costs of production and the organization of work. This suggests that the crucial issue is the structure of workplace norms and the position of different groups of workers in relation to those norms.

The report concludes with a set of specific questions that should be raised in order to address the questions of flexibility, human capital and equality together.

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Introduction

Increasing vulnerability at work is a feature of the new economy. By almost all measures, vulnerability for workers is increasing: workers now have less power in the workplace; they are compelled to assume more risk in the labour market; and they enjoy less job and income security as a result. In addition, there are growing numbers of workers who are especially vulnerable, either because they generate inadequate income; because they are engaged in marginal self-employment and are not legally recognized as employees; because their work is either inadequately regulated and protected or falls outside the regulatory net governing work altogether; because they have conditions or obligations that impinge on their capacity to participate in the labour market; or because they are subject to particular forms of discrimination and disadvantage at work.

These phenomena are inseparable from the transformation of work in the new economy and the dominant trends in respect of the regulation of economic activity. One result of the series of shifts - technological, ideological, regulatory, institutional and cultural – associated with economic restructuring and the reorganization of production is that many workers experience both declining power at work and declining terms and conditions of work. Because the fate of workers the new economy is inseparable from the social, political and economic wellbeing of societies, the question of work is now the subject of sustained analysis and debate across industrialized and developing states (World Bank, 1995; Supiot, 2001; Auer and Gazier, 2002).

Addressing the vulnerability of workers is an essential part of responding to the social deficit of globalization (UNDP, 1999). There is a compelling argument that one of the most pressing imperatives in the new economy is to find a way to better distribute both the costs and gains of

economic restructuring. What occurs in and around labour markets is crucial to this objective: markets remain the most important mechanism of distribution, far outstripping what occurs through taxation and transfers through the state (Collins, 1999). Because of the fiscal pressures on states in a world of capital mobility, labour market participation is increasingly central to individual and household welfare (Avi-Yonah, 2000; Esping-Anderson, 1999). Although it is clear that the fate of workers can be profoundly affected, both for better and for worse, by a wide range of economic and political actions and decisions, much of the problem of worker insecurity in the new economy will have to be solved 'at work'.

Addressing vulnerability at work requires analyzing the norms, rules, policies and institutions that now structure transactions in labour markets and productive activity in general. At the level of policy and regulation, however, little has been done in Canada to better enable workers to weather the ups and downs in a world of work that has become much more volatile, unstable and insecure. Responses have tended to be piecemeal, and comprehensive analysis of their effects scarce. So far, reforms have more often reflected employers' demands for greater flexibility and lower labour market costs than employees' need for more protection and security. The effect has been to intensify the vulnerability of workers: the paradox is that, rather than ameliorate workplace vulnerability, reforms to labour market and other institutions are increasing the disadvantage that workers experience due to phenomena such as the reorganization of production and global economic integration.

This paper reflects on the role of governance models and regulatory choices in the production of workplace vulnerability and emerging forms of insecurity for workers in the new economy. It considers in particular the emerging idea of 'good governance' and the rise of labour market flexibility norms and their significance for workplace vulnerability. Rather than 'solve' the problem of vulnerability at work, it aims to identify the main trends in governance and regulation

that may affect the vulnerability of workers, to identify assumptions and concepts that are important to the direction of current legal and policy reform, to flag particular issues that bear attention and further investigation, to suggest what might be at stake for vulnerable workers in the regulatory options on offer and finally to pose some questions that should be at the forefront when policy and regulatory design is at issue.

Much of the general debate around labour market policy and regulation is now focused on questions of enhancing the competitiveness of firms and the economic position of states as a whole. Enhancing the 'human capital' of workers has been widely identified as central to this enterprise. Indeed, traditional concerns around worker protection, empowerment, and security are increasingly merged into the question of improving workers' skills and adaptability in the new economy. Because this issue is now so salient in labour policy debates, this study considers the impact of human capital strategies on vulnerable workers. It also attempts to foresee the extent to which such strategies intersect with or diverge from equality concerns; by way of illustration, the study makes specific reference to the feminization of the workplace.

The analysis proceeds from the assumption that the increase in workplace vulnerability is not inevitable, at least to any pre-determined degree, nor need new economy jobs be inherently insecure. Even workplace flexibility is a goal that might be conceived, and furthered, in ways that benefit workers too. Rather, depending on how we respond at the level of law and policy and in the design of legal institutions, we can enhance or lessen the general degree of vulnerability in the workplace and intensify or ameliorate the divisions between protected 'insiders' and vulnerable 'outsiders' in the labour force.

I. Sources of Vulnerability at Work

A. The role of law

Being, or becoming, a vulnerable worker, is not simply a matter of the characteristics of the individual worker. Nor is it something that can be attributed solely to the changed economic context in which workers now operate. Vulnerability is a function of how work is structured and how risks and costs are allocated among workers, their employers, the state, and society at large.

Vulnerability and insecurity at work can arise from:

- 1) the distribution of risks, costs, benefits and powers among workers and employers;
- 2) the (in)capacity of workers to conform to or perform according to workplace rules and norms;
- 3) the allocation of work among workers, including unpaid work;
- 4) (in) access to resources;
- 5) discrimination, either *directly* on the basis of a particular characteristics or grounds or through their intersectional operation or *indirectly*, because of the connection between these grounds and the factors listed above.

Although there is a variety of forces at work, legal rules and institutions play a role in all of these forms of vulnerability. Legal entitlements and institutions both produce and legitimize the norms governing work. They affect the distribution of resources and power; they spread and shift risk among the parties involved in production; and they allocate responsibilities among different social spheres and institutions such as the state, firms, families or households, and the wider community. They constitute the incentive structure in which firms make decisions about

profitability and workers make decisions about whether and where to work. Legal rules and categories also determine the boundaries of the enterprise and the limits of enterprise liability in production. Legal rules and institutions both reflect and constitute the world of work; they both create and remedy inequalities and injustices among different groups of workers. Thus, whatever the force of economic pressures in the new economy, law is involved to some degree in both the response to and the production of workplace vulnerability (Conaghan, Fischl and Klare, 2002).

Legal and institutional choices matter enormously to the positions of workers in general, as well as to the prospects of particular groups of workers. The increasing vulnerability, insecurity and economic disadvantage for workers at the current time are a consequence of shifts in both the economic context and the rules and norms governing work. They arise from changes in the geography of production, the organization of work, the identity of workers *and* either 1) the lack of regulatory and policy responses to those shifts; 2) regulatory 'lag'; or 3) policy and regulatory responses that are inadequate or uncongenial to the interests and needs of workers, often because they aim to create flexibility and reduce costs for employers.

The legal regulation of work operates at both the material level and the normative, ideological or discursive level. When attempting to identify the role of law in shaping workplace norms, generating poor distributive outcomes for workers and increasing the amount of workplace vulnerability, it is crucial to attend to both levels. Assessing the role of law in worker insecurity involves documenting the gaps between the existing rules and policies governing work and the emerging world of work itself, noting the discontinuities that have arisen between work and its regulation. However, it also requires analyzing the effects of shifting norms and assumptions respecting the nature of work, the organization of production, and workers themselves.

B. Globalization, the new economy, and the new world of work

One of the features of an increasingly integrated global economy is a disjunction between regulatory and productive space (Arthurs, 1996). In the immediate post-war years, states had relatively complete and functional regulatory power over the economic activities within their jurisdictions (Kapstein, 1999). This relationship has now loosened; no jurisdiction necessarily 'occupies the field' in respect of the regulation of work. Economic activity and regulatory scope no longer necessarily coincide. Much economic activity traverses borders and the production of goods and services increasingly involves inputs, including labour, from multiple locales. As a result, it may be impossible to identify where goods are manufactured and difficult or unhelpful to know where a corporation is located.

Just as important is that work has been radically reorganized. No longer is the Fordist enterprise the norm. Production has been flexibilized (Piore and Sabel, 1984), the enterprise has been vertically disintegrated, and production is increasingly diffused among complex networks of contractors, subcontractors and homeworkers (Castells, 2000). The *type* of work has also changed: manufacturing is in decline, and increasing numbers of workers are engaged in service work, much of which is low-skill and low-wage. Finally, the social norms governing the relations and expectations between workers and their employers in respect of critical issues such as remuneration and job security are undergoing transformation (Stone, 2001). For all of these reasons, rising number of workers labour in part-time, casual, contingent, insecure, and low-paid work.

In addition, the identity of the 'normal' worker has changed. Existing labour and employment rules and social protection policies were modeled on the assumptions that the average worker was a male head of household who could be expected to have relatively uninterrupted labour

market participation in full-time work until the normal age of retirement. These assumptions were institutionalized in a series of social protection policies and workplace rules and practices that were designed to protect such workers against a set of defined risks, redistribute income to them over their lifetimes, and enable them to maintain dependents. However these embedded assumptions about who workers are and what they require are increasingly unsafe, in part because of the feminization of the labour force (ILO, various years; Standing, 1999). Myriad interrelated forces, ranging from changing gender norms, the diversification of family forms and the sheer instability in household structures, have provoked the feminization of work; they have been reinforced by declines in real income over the last generation that have rendered the old male-breadwinner model inadequate to sustain a household in any event. The upshot is that the average worker is now as likely to be female as male; she may well be a head of household herself; in any event, she is as likely to be supporting dependents as her male co-worker. However, she is also likely to have different patterns of labour force participation; face different risks both in and out of work; and experience competing obligations largely unknown to her male coworkers.

The gaps and discontinuities between existing labour and employment rules and standards and the actual world of work makes those rules and standards both less functional and less responsive to the contemporary needs of workers. This regulatory gap is creating a massive and growing gap between protected and unprotected workers, 'insiders' and 'outsiders' in the labour market: legal entitlements and social protections designed for employees within a standard employment relationship both apply to a diminishing number of workers and reflect a set of assumptions that fails to correspond to the actual circumstances of increasing numbers of workers. Indeed, they may not only fail to protect many of these workers, some rules may actively disadvantage them. Another is a significant redistribution of entitlements and power away from workers as a group. A major function of labour and employment rules and standards

is to redress the characteristic imbalance of power between workers and their employers in labour markets (Smith, 1776; Polanyi, 1944), both by facilitating collective bargaining and by guaranteeing workers a basic floor of entitlements. The regulatory gap lessens the capacity of labour market institutions to achieve such objectives; to the extent that they fail to deliver on these goals, substantial numbers of workers are measurably worse off.

II. Globalization and Governance in the New Economy

Changes in the world of work pose create formidable challenges on their own. But as countless commentators have observed, a crucial feature of the changed context of work is the growing power of capital, along with a correlative weakening of worker power and trade union influence, in the regulation of economic activity. Corporations, investors and employers are increasingly able to influence the direction of labour and employment policy and the extent of social protection through their ability to 'vote with their feet'. Exit, or the threat of exit, on the part of investors places downward pressure on labour market and other regulations, chilling policy and regulatory responses to new and emerging forms of worker vulnerability, especially where they have, or are perceived to have, adverse economic implications for investors.

Yet however important the power of capital vis-à-vis states in the global economy, the increasing vulnerability of workers is also a function of a changed set of premises regarding the role of the state in economic activity and social life writ large. To put it simply, the 'deregulatory' pressure cannot be attributed only to the erosion of sovereign regulatory power due to the rise of capital in the new economy. It is also the result of a profound challenge to the settled wisdom about the value of labour market regulation and the redistributive state across the industrialized and developing world (Arthurs, 1996). The new focus on regulating labour markets for

competitiveness (Collins, 2001) means that many jurisdictions are seeking to promote labour market flexibility for employers as much as, or more than, protection for workers. This, too, is an important source of declining worker power and increased vulnerability at work.

A. Good governance: The context

This new regulatory logic is intimately linked to the emerging ideal of 'good governance' in a globally integrated economy. While debates around governance are varied in form and multidisciplinary in scope (Wood, 2003), 'good governance' refers to a set of best practices in statecraft, regulatory policy and the management of the economy now circulating among political elites and the economic technocracy that are being promoted by, among others, the international economic and financial institutions (Williamson, 1993; World Bank, 2002; IMF, 1997, Rittich, 2002b). Closely related to the 'Washington consensus' out of which it emerged (Williamson, 1993), an important part of the good governance agenda is the active effort to replace the Keynesian welfare or regulatory state with a more confined, 'market-friendly' alternative that is securely focused on the goals of enhancing efficiency and growth. This idea of good governance has had considerable purchase not merely in Canada but in the wider Anglo-American world in the last two decades: legal and policy reforms are increasingly put forth in its name, while others, are foreclosed or excluded because they ostensibly conflict with it. Indeed, the regulatory and policy implications of good governance are becoming increasingly detailed, elaborate and prescriptive (World Bank, 2003; World Bank, 2004). Because the reregulation of labour markets and the restructuring of social welfare policy are central to these governance norms, it seems important to engage the model and its regulatory logic, consider the assumptions, stated and unstated, upon which it rests, and evaluate its implications for vulnerable workers.

Before analyzing the nature of good governance, it is useful to distinguish between two dimensions of globalization that are often conflated: globalization as a set of factual or empirical developments and globalization as a regulatory and governance project. Globalization as a 'fact' refers to the process of 'time-space' compression that has resulted from a series of innovations in the domains of technology, information processing and transportation, all of which have spurred increased economic integration, the reconfiguration of production, and the widespread transformation of work (Castells, 2000). Globalization in this sense has increased the mobility of capital and generated commensurate weakness and vulnerability for workers who, for both practical and legal reasons, remain less mobile and very largely tied to their communities. However, globalization is also an institutional project. The direction, speed, extent and intensity of global economic integration has been driven by a series of regulatory and policy decisions at the international, regional, national, provincial and local levels that have more tightly linked national economies, eliminated barriers to trade, investment and capital flows, enhanced property and investor protections, and remade the role of the state in domestic economic activity. The resulting regulatory regimes have been much more favourable to investor than labour (and other) interests (Stiglitz, 2000). Thus, regulatory and institutional priorities, choices and decisions too have tilted the balance of power in favour of employers.

Although this regulatory project is often represented as an unavoidable part of the new economy, globalization as a 'fact' does not entail globalization as a regulatory project in any particular form. Despite the tendency to invoke global economic integration as a force compelling regulatory change in a particular 'deregulatory' direction, integration does not compel convergence or harmonization. There is no single set of institutions and rules required by global economic integration (Rodrik, 1999). Pressures for regulatory harmonization are often overstated (Helliwell, 2002), and it is clear that a variety of factors can restrain, even reverse, any 'race to the bottom' in respect of rules, standards, and institutions. In any event, there is

clearly a domain of choice even under 'global' pressures. There are important differences in how the current economic transformation is being managed across industrialized states; these regulatory and institutional choices greatly affect the status of workers and the extent of social inequality (Bakker, 1999). There is also no set of institutions that can be unequivocally associated with growth, even in a globalized economy. In any event, the new emphasis on the role of human capital in a 'knowledge' economy complexifies the policy and regulatory calculus in ways that have yet to be comprehensively analyzed.

These two dimensions of globalization – transformations in the world of commerce and production and regulatory and institutional reforms – clearly interact. However, attending to the differences between them brings into focus the role of law and policy in *creating* the new economy. If law plays a constitutive role in the new economy, if legal choices and decisions do not follow as merely 'technical' dimensions of globalization, the question is how law builds the new economy, the world of work in particular, and how it might either contribute to or mitigate emerging forms of vulnerability for workers.

B. Good governance: The model

'Governance' can be distinguished from 'governing' or government in the traditional sense in a number of ways. The concept of governance is intended to recognize the wide range of actors and institutions, both domestic and international, that now affect the normative and regulatory context in which economies and societies operate. 'Good governance' also reflects a particular set of regulatory preoccupations: respect for the rule of law, transparency, accountability, stability and certainty of the regulatory and policy environment (IMF, 1997). Although these preoccupations have their genesis in development literature (World Bank, 1989; World Bank, 1994), they are now thought to be important for countries at all stages of development. Indeed,

the concept of good governance is now widely deployed across a variety of different contexts, social, political and economic; for example, it is now common to speak of good governance in respect of corporations.

An important dimension of good governance is the decentering of the state in favour of a greatly increased role for market forces and non-state actors and civil society groups, sometimes referred to as the 'third sector', in social and economic life. Good governance models explicitly seek to allocate to groups other than the state a much greater role in the generation of norms, the solutions to various forms of 'market failure', and the provision of services (World Bank, 2002). At the same time, good governance prescriptions remain centrally preoccupied with the state and its role in the economy. Key to the good governance project is the effort to displace the regulatory or protective state in favour of what might be described as the 'enabling' state. The animating belief is that, aside from institutions that are thought to enhance efficiency, state 'intervention' in the economy tends to be an impediment rather than an aid to economic growth. For this reason, governance reforms tend to be directed at tasks such as reducing the size of the state, limiting its role and reach within the economy, and redesigning the public sector so that it better conforms to market principles. No longer actively managing the economy or redistributing economic resources to any significant degree, the central role of the state is to secure the background or framework conditions of economic growth by providing the physical and regulatory infrastructure and essential public goods and services that clearly cannot be provided through the market.

Good governance norms involve not only the promotion of a certain style of governance; they also contain a set of ideas about what governance is *for*. To put it another way, good governance norms are as much substantive as procedural or institutional. Moreover, much of the implementation of good governance is regarded as a managerial or technical task; this is

why there can be general or universal governance principles that are the subject of expert advice. As currently conceived, the primary governance objective is to implement the rules and institutions thought necessary to enhance efficiency and competitiveness and ultimately promote growth. Under good governance, 'efficient' legal regulation is understood as regulation that facilitates capital flows and financial transactions and secures the investments needed for growth. It requires respect for the rule of law and the protection of a set of core legal entitlements, in particular property and contract rights, on the one hand and the absence of 'arbitrary' or, still worse, corrupt action on the part of the state on the other (Shihata, 1997). In general, regulation beyond these core entitlements, unless compensating for some form of market failure or externality, is presumed to be value-subtracting and undesirable. Even in cases of market failure, action by the state is only indicated where alternatives are unavailable, and where the benefits clearly outweigh the inherent risks of 'government failure' or capture by private or 'special' interests (Rittich, 2002b).

As a consequence of profound critiques of the assumptions on which good governance efforts were originally founded, governance debates now reflect increasing attention to the 'social, structural, and human' dimensions of economic development (Sen, 1999; Wolfensohn, 1999). There is a growing consensus that attention to issues ranging from health and education to human and workers' rights is not only of independent importance, but closely intertwined with economic growth and political stability as well. This 'socialization' of economic debates has shifted the discussion squarely into the field of law and policy. In important ways, the central debate now is *how* economic and social concerns relate to each other; the legal and institutional questions are whether and in what ways social cohesion, inclusion and distributive justice contribute to economic growth and the degree to which they can be accommodated within market-centered legal regimes.

These debates are still in their initial stages. However, it is worth bearing in mind that the presumption in favour of a limited role for the state remains powerful, as does the view that any regulatory initiatives must be compatible with market forces (Gunderson, 2002). And despite a revised consensus in favour of greater attention to social and equity issues, in general, as a legal and policy matter they are still regarded as 'add ons', things to pursue to the extent that they are compatible with efficient regulation.

C. Good governance: Assumptions and effects

Good governance is a regulative ideal; no state actually functions according to its norms. Nonetheless, notions of good governance and the associated ideology of efficient regulation are powerful forces in contemporary regulatory and policy debates; among other things, they help legitimize particular reforms and policies and they help delegitimize others. Thus, in considering arguments around good governance, it is useful to keep the following caveats in mind.

First, despite the increasing tendency to associate good governance with the adoption, or prioritization, of particular rules, institutions and policies on the part of the state (World Bank, 2004), there is no single set of entitlements that constitutes the 'free market' (Tarullo, 1985; Rodrik, 1999). Rather, market economies have historically varied, and continue to vary considerably, in their legal and institutional structures.

Second, the contribution of different legal rules and institutions, as well as a wide variety of social and economic policies, to the competitiveness and efficiency of both firms and economies as a whole in a globally integrated economy remains deeply contested (Stiglitz, 2002). Perhaps nowhere is this more so than in the field of labour and employment law. While the neoclassical economic theory that largely informs the governance debates assumes that labour market

institutions are likely to be counterproductive, there are forceful accounts, both empirical and theoretical, that describe how labour markets routinely operate in ways that deviate from standard economic models and suggest why it is that labour market regulation of various types might contribute to the efficient, as well as the equitable, operation of both firms and markets (Solow, 1990; Deakin and Wilkinson, 1994). Parallel observations can be made about a variety of social protection programs and the provision of a range of social goods and services; indeed the arguments for various forms of protection, insurance, goods and services arguably *increase* as human capital becomes more important. In short, the connection between rules and institutions and social and economic outcomes is more unstable, contingent and contested than good governance debates suggest.

Third, despite the label, in practice, good governance inevitably means much more than merely competent, technical management of the economy. Whatever their efficiency effects, legal rules and policies inevitably have distributive consequences: determinations about legal entitlements and institutional design directly affect the allocation of resources and power and the distribution of risks among different actors and groups (Klare, 2002). These observations have equal force, whether the state is enforcing the 'rights' of investors or 'regulating' labour markets.

Governance models that privilege property and contract rights and discourage regulatory 'intervention' on behalf of workers are directly relevant to the question of vulnerable work in at least two ways. Because they empower employers and disempower workers in quite concrete and identifiable ways, as compared to other models, they can be expected to produce greater insecurity and income inequality among workers. But because a variety of labour market rules and institutions may in fact promote, rather than impede efficiency, they may be detrimental to growth and the production of good jobs. Analyzed from this angle, it becomes clear that good governance policies unavoidably involve political and social choices; they may be driven by belief as much as fact.

Arguments that the government should not 'intervene' in the economy tend to be both unpersuasive and unhelpful in resolving the policy and regulatory questions around the new economy in any event. For example, the idea that the state 'distorts' the market when it regulates the labour market but merely protects private rights when it extends intellectual property rights now seems transparently unpersuasive. One reason is that it rests on assumptions about the distinction between private rights and regulation and the presence or absence of public power that have long been problematized in law, especially in regard to economic transactions and the sphere of production (Singer, 1988). The government necessarily and inevitably 'intervenes' in the economy through its role in determining and enforcing the rules and institutions that govern economic transactions. Hence, the question is not *whether* it should act, but for what purposes and to whose benefit. Arguments against intervention simply impair the central task: assessing, in as complete a way as possible, the role of law and policy in the production and amelioration of workplace vulnerability and disadvantage in the new economy.

D. Rethinking efficiency

Because the enhancement of efficiency and competitiveness plays such a central role in contemporary good governance arguments, it is crucial to understand what is actually entailed by the promotion of efficiency and to analyze the effects of regulatory and policy changes that are advanced in its name.

Efficiency-enhancing reforms may of course represent net gains through the reduction of deadweight costs that are of benefit to no one or that exceed their benefits. However, another possibility is that costs may be shifted rather than simply eliminated in the course of policy and regulatory changes to promote efficiency. Thus, 'efficient regulation' may only represent a

transfer of risk, cost or burden from one party to another, as apparent savings in one place show up elsewhere. For example, changes to job security rules may assist employers in the course of economic restructuring but place additional costs on the affected individuals, households, community or the state. Even if such changes contribute to growth and efficiency in the aggregate, something that can by no means be assumed, those who lose out may not experience the gains that accrue to the economy or society at large. In the alternative, reforms may exact hidden costs, costs that while not visible in the current efficiency calculus actually *do* turn out to affect either the economic performance of some workers or the economy as a whole in the medium to long term. For example, cutbacks to expenditures on health, education and income transfers may have not only obvious adverse effects on the degree of social cohesion and levels of economic equality: they may have long-term effects on the extent and quality of workers' labour force participation. Moreover, cutbacks to welfare may directly increase the amount of vulnerable work that is performed if they compel more people to engage in low-wage work on unfavourable terms (Williams, 2002). Thus, even where there appear to be aggregate gains, it may still be unclear if efficiency-enhancing reforms are desirable if they adversely affect the prospects of large groups of workers, unless there is also a means to ensure that the losses they endure are offset. For these reasons, claims that particular policy and regulatory initiatives are inherently efficiency-enhancing need to be subject to assessments of their benefits and detriments in particular contexts, assessments that are much more far-reaching than typically occur in good governance prescriptions. We need to assess not only the question of gains, but consider rather 1) who wins and who loses, and 2) whether institutional mechanisms are available to ensure that the losses and benefits can be redistributed.

Labour market institutions and social protection policies are of obvious interests, as one of their major functions is to redistribute resources and power, not only between workers and employers in the labour market but among workers, households, and society at large. Whether they are

mandated legislatively or negotiated collectively, workplace rules and standards typically compel greater cross-subsidization among workers than occur under individual contracts of employment; one reason is that all workers contribute to the cost of events that only materialize for some. The same is true with respect to social policies and social protections: they both ensure access to particular goods and services and compel the sharing of risks across the population. Thus, whether costs can be avoided rather than merely shifted and whether and why they are better allocated to one party or institution rather than another should be central to any discussion of the regulation of work.

Despite the arguments on the grounds of efficiency, any general bias against labour market regulations and social protection in general is likely to both intensify the problem of workplace vulnerability and withdraw from consideration crucial tools for relieving it. Moreover, except in the case of 'win-win' scenarios, governance norms may actually be self-undermining. A range of policies associated with current good governance can affect either the position of workers in general or the position of particular groups of workers, either because they shift risks and costs or because they contain 'embedded' or submerged social and distributive decisions or biases (Elson and Cagatay, 2001). Monetary policies, for example, may protect against inflation at the expense of employment and growth, imposing disproportionate costs upon workers, small operators and local consumers (Stiglitz, 2002). Fiscal austerity drives may affect health, education and other 'social' expenditures, creating increased unpaid work obligations for some women; this may, in turn, both limit such women's capacity to engage in paid work and intensify the degree of poverty in households.

To the extent that fiscal austerity or the privatization of public services affects employment in the public sector, it is also likely to reduce access to better protected and remunerated forms of employment. It is well-known that in such circumstance, not all work simply disappears; it may

simply be contracted out and performed at lower levels of compensation and security. Indeed, it is an article of faith in the governance agenda that reliance on private provision should be pursued in the normal course wherever possible. Thus, it may simply transfer risk to workers and redistribute the costs of service provision. Access to public sector employment can also be disproportionately important for particular groups of workers. Women workers, for example, have historically fared better in public than private sector employment; access to public employment may also be important to racialized groups, immigrant workers, and others who for diverse reasons have difficulty accessing networks to better jobs in the private sector. In short, there can be significant overlap among those who are vulnerable at work and those who experience social disadvantage on a particular ground or axis.

These connections need to be noted in a systematic way: unless some form of compensatory action is taken simultaneously, it should be expected that, whatever their beneficial effects with respect to fiscal objectives, decisions to reduce the amount of public sector employment may exacerbate the problem of vulnerable work.

Finally, it is important to remember that legal rules and institutions tend to operate and interact with both formal and informal norms in complex and far-reaching ways. Legal or institutional reforms in one place directed at one problem may generate effects that show up elsewhere. Some of these effects may be positive; as a result, there may be synergies between other objectives and the solutions to workplace vulnerability. However, reforms designed to further goals including enhanced efficiency and competitiveness may increase the incidence of vulnerable work; in the alternative, reforms designed to ameliorate workplace vulnerability may be effectively undermined by countervailing changes elsewhere. Because worker insecurity can be affected, both for better and for worse, by changes in so many areas, addressing it compels a broad, integrated look at policy and regulatory shifts across the economy. Solutions may

implicate not only labour and employment law and social protection policy: they may include immigration, tax, health and education policy, family law and corporate law (Philipps, 2003).

III. Dominant Trends in Labour Market Regulation

A. Labour market flexibility

Since the late 1980s, labour market flexibility has formed an integral part of the idea of good governance (Williamson, 1993; Standing, 2000). Yet while flexibility arguments are circulating in virtually all states, industrialized and developing, there is wide variation in how industrialized states are responding to the transformation of work in the new economy and the increased insecurity for workers. Although there are important variations, flexibilization is arguably the dominant trend in relation to labour market regulation in Anglo-american jurisdictions. The economic case for labour market flexibility rests on the theory that labour market regulations constitute a source of inefficiency that impedes growth. In the standard neoclassical account, labour market rules and institutions, like other regulatory 'interventions', distort the optimal operation of labour markets by introducing rigidities, raising wages above their market price, and imposing higher costs on employers. This, in turn, costs jobs and impairs growth; it also introduces distributive problems into labour markets, protecting 'insiders' at the expense of outsiders (OECD, 1994; IMF, 1999; World Bank, 2003). The standard remedy is to reform labour and employment laws to decentralize bargaining, lessen the extent of job security, and restrict access to unemployment benefits and other income entitlements (IMF, 1999). In addition, proponents of deregulation often expressly argue that the rewards to work should be destandardized in order to spur greater effort and promote growth. According to this argument, compensation should be based upon merit and demonstrated productivity rather than on seniority and other 'non-market' modes of remuneration.

While calls to diminish labour markets protections have always been heard from some quarters, they have now received an additional boost as they seem to overlap with the specific demands and characteristics of the new economy. In recent years, it has become accepted that the relations of production needed to thrive in the new economy are flexible ones (Piore and Sabel, 1984). Regulating for competitiveness in a world of flexible production is said to require increased room to maneuver for employers on the one hand and increased skill, responsibility and initiative among employees on the other. The claim is that this makes old ideas about labour market regulation obsolete, and the rules and institutions generated under them dysfunctional or simply irrelevant in the new economy. In their stead is a new regulative ideal: employees should become 'partners in production', assume greater risk in the labour market and adopt an entrepreneurial approach to work and economic security. These transformations in economic organization have induced a wide-ranging reconsideration of existing labour and employment laws, with scholars in a variety of disciplines and from multiple jurisdictions proposing ways to reinvent norms and institutions to accommodate the imperatives of flexibility and change at work (Barenberg, 1994; Stone, 2001; Collins, 2001).

Another important component of the current narrative on labour market regulation is that labour market regulation and social policy should be consistent with and structured around the demands of the emerging 'knowledge-based' economy (Collins, 2001; Minister's Roundtable, 2002; Courchene, 2001). It now approaches conventional wisdom that the road to success in the new economy is through high-skill, high-value added production (World Bank, 1999; Chaykowski, 2002). A central element of the knowledge-based approach to economic growth is a focus on developing the human capital of workers, in particular through investments in education, training and skills development. In this model, economic security for workers is expected to come not from longtime attachment to particular firms or employers, but from the possession, refinement and successful marketing of skills by the individual worker in a

constantly shifting labour market (Stone, 2001). Thus, the focus is on policy and regulatory interventions that are directed toward increasing workers' capacity to be productive workers. Active labour market policies – those that assist workers in returning to work – are preferred over employment standards protections or passive policies that merely support workers' income during periods of unemployment (Porter, 2003).

Despite the belief that flexible production and 'knowledge-based' economic growth represent the future of work and the deep interest in regulatory reform to support this path, it seems clear that these developments do not pose the only, or even the most pressing, regulatory problem of the new economy, especially in respect of vulnerable workers. The new economy also produces significant numbers of relatively unskilled jobs, many of which do not pay well enough to allow workers to support families above the poverty level. Indeed, the emergence of "mcjobs" and the phenomenon of "Wal-Martization" appear to be as representative of the changed terrain of work as the emergence of knowledge- and skill-intensive work (Yakabuski, 2001; New York Times, 2003). Many of these jobs, especially relatively low-skill service jobs, seem likely to remain an integral part of industrialized economies such as Canada. Enhancing the role of skill in such work in order to increase the income security of workers may be a limited strategy, as such work is expressly organized to require little skill and render workers easily replaceable. Although they too may experience 'flexible' work relations, such workers typically lack significant, or any, control over the terms and conditions of their work. The best prospects for assisting such workers may lie in better access to workplace representation and collective bargaining and perhaps enhanced employment standards such as higher minimum wages. The case for reforms that empower low-wage and low-skill workers and mandate improvements to their working conditions and compensation levels is especially compelling to the extent that such jobs are not merely waystations on the road to better ones, but effectively the future of work for significant numbers of workers.

It seems clear that for many workers there are increasing returns to education in the new economy. Yet, it may be unsafe to simply assume that even relatively highly-skilled workers can automatically expect to achieve income and employment security on the basis of skills alone, especially if the demand for such workers declines. It has been recognized for a significant period of time that global economic integration puts jobs such as manufacturing at risk in high wage industrialized states. However, as the number of skilled workers in countries such as India and China increases, opportunities for 'offshoring' or 'outsourcing' white collar work also increase, creating new sources of competition and new forms and sites of vulnerability for workers. How much this is a serious issue for the domestic labour markets of industrialized countries is currently unknown; many displaced workers may indeed be absorbed in equivalent or better jobs, as conventional economic wisdom proposes. However, it is unlikely that labour market restructuring in white collar work will be entirely painless or costless; rather some, perhaps a significant number, will end up worse off. Because very few workers in such sectors have any form of collective representation – indeed, if they are classified as managerial or supervisor employees they may be explicitly excluded from collective bargaining law - they are badly positioned to negotiate with their employers over changes in the terms of work or to craft solutions that lead in directions other than a decline in compensation, job security and levels of work.

Notwithstanding these developments, so far labour market flexibility has largely functioned as a code word for lowering entitlements and security for workers (Standing, 1999b). On the one hand, there are some new sources of 'time' flexibility for workers. For example, some jurisdictions have introduced new entitlements to family leave under provincial employment standards legislation¹. However although leave is now available, the cost of taking it is still

¹ See for example *Employment Standards Act, 2000*, S.O. 2000, c. 41, s. 50.

imposed on workers, making it less useful, and perhaps unavailable, to the most economically vulnerable workers. More paid leave is also available in through extended entitlements to maternity and parental benefits under the federal *Employment Insurance Act*. In addition, workers in federally-regulated industries, as well as those in provinces who have made the necessary amendments to their employment standards acts, are entitled to six weeks of benefits in conjunction with leave to care for a critically ill family member². But despite the introduction of measures to allow workers some time off work to meet their most pressing obligations of care, workers are also likely to be squeezed at the other end as a result of changes to workplace regulations which exacerbate the time demands of work (Fudge, 2001). In the aggregate, rather than increase the control that workers have over their working hours, so far regulatory and policy changes have largely reflected employers' demands for greater flexibility in the allocation of working time, diminished regulatory burdens and lower payroll costs.

Labour market flexibility or 'deregulation' takes both active and passive forms (Standing, 1999b). Examples of overt or active deregulation in Canada include: exemptions from normal workplace rules for particular classes of employees; alterations to employment standards that increase the latitude of employers to organize work and/or lower or remove protections for workers³; changes to collective bargaining rules that exclude particular classes of workers from the protections afforded by labour relations legislation⁴ or increase the barriers to collective

² *Employment Insurance Act*, S.C. 1996, c. 23.

³ See for example the changes in the Ontario *Employment Standards Act, 2000*, S.O. 2000, c. 41, raising the number of hours employees are permitted to work per week and allowing employers to 'average' overtime hours with the effect that employees' entitlement to overtime compensation is reduced.

⁴ *Labour Relations and Employment Statute Law Amendment Act, 1995*, S.O. 1995, c. 1, s. 80.

bargaining in general⁵; and restrictions on access to employment benefits or declines in the amount of income replacement such benefits provide.⁶

Although overt attempts to diminish labour market protections are likely to attract more attention, passive labour market deregulation may in fact be more significant to the position of workers in the labour market and the production of precarious work. Passive labour market deregulation results from the failure to change employment standards and collective bargaining rights so that the degree and extent of protection afforded to workers is effectively reduced; a classic example is the failure to raise the minimum wage so that its real value is eroded over time. However, passive labour market deregulation can also occur through the irrelevance, either practical or juridical, of existing regulatory, protective and redistributive mechanisms to emerging *forms* of work or to growing numbers of *workers*. In short, because workers in different sectors and different forms of work are differentially empowered and protected by employment standards and collective bargaining laws, labour markets can be substantially deregulated simply by the failure to change labour market rules and institutions as the nature and organization of work changes.

Because of the transformation of work and the reorganization of production, growing numbers of workers find themselves in atypical or contingent employment relationship, that is, work that deviates in some way from that which we think of as 'normal' work: full-time, long term work involving regular hours with a single employer. Some workers may be employed by those who are not themselves substantially in control of the degree, conditions or compensation of the

⁵ See for example the *Labour Relations Act, 1995*, S.O. 1995, c.1, moving from a card-check to a vote-based certification system.

⁶ The number of hours of work required to access employment insurance has increased in recent years. As a result, the number of workers who are actually able to access benefits while they are unemployed has decreased; significant numbers of workers, particularly those engaged in part-time work, while formally entitled are substantially excluded from the regime.

work their workers perform. This may be because workers are in triangular employment relationships and are formally employed by agencies who supply their labour to others. It may also be because workers find themselves in newly competitive labour markets: here, employers may themselves have little room to maneuver on wages and working conditions absent a collective solution; they may also be constrained by the choices and decisions of those higher up in the production chain. Finally, some workers may no longer be employees at all. Significant numbers of workers are self-employed; the majority of those are own-account workers (Human Resources Development Canada, 2000), some of whom find themselves doing essentially the same jobs for their former employers. Although they are classified as independent contractors, many have little actual control over the terms and conditions of work and many generate less income than employees. While some may be classified as dependent contractors and have access to some of collective bargaining, and even occasionally common law, benefits of employees (Langille and Davidov, 1999), most are simply on their own, beyond the reach of employment protection and unable to benefit from collective action, even though they may be among the most vulnerable workers.

Where work is vertically disintegrated (Collins, 1990) and organized in networks or production chains of legally independent firms and employers, the variation in the status, working conditions and compensation of workers can increase dramatically. While some workers typically continue to have access to full-time relatively well-compensated and secure work, many others experience increased job insecurity, lower compensation, and diminished access to workplace representation. Indeed, part of the point of the reorganization of production is often to lower labour costs and avoid the employment obligations that would otherwise be incurred.

However, employment standards and collective bargaining rights are not in practice equally available even to all *employees* (Fudge, 1991). In part, this is because those engaged in

atypical work relationships in practice have less access to collective bargaining and employment standards protections, even though they are formally covered by the same regulations as employees engaged in 'normal' work. It has long been observed that while collective bargaining rules serve those in fixed, integrated, medium to large operations – those whom they were originally designed to serve - relatively well, workers who labour in smaller operations, vertically disintegrated, subcontracted or networked production in dispersed locales often find it virtually impossible to organize, or to bargain successfully when they do succeed in achieving certification. Thus, passive deregulation may result from continued reliance upon workplace entitlements that are either designed for or restricted to those in full-time employment where the number of workers engaged in atypical forms of work is rising.

The changing nature of work is also critical to the deregulation of labour markets. Collective bargaining is also better entrenched in some sectors, such as manufacturing, resource extraction and the public sector, than others; although some inroads have been made, those in retail, service and clerical work are notoriously underserved by collective bargaining. These issues are deeply relevant to the question of vulnerable work as service jobs are proliferating in the new economy while manufacturing jobs are in decline.

Workplaces can also be effectively deregulated through a lack of adequate enforcement mechanisms. Under-enforcement is a persistent risk in governance models based upon fiscal austerity and a reduced regulatory presence of the state in the economy; it is also a growing problem in the new economy (Hepple, 2002). But workplaces can also be effectively deregulated because of declines in union representation, as the presence of a union and access to arbitration is often needed to ensure the actual enforcement of employment standards and human rights; thus access to collective bargaining and the maintenance or improvement of employment standards are in practice deeply intertwined. For example, arbitration provides a

quick and protected means to enforce employment standards and human rights law as well as the rights negotiated under collective agreements in unionized workplaces. Because of fears of reprisal, as well as the well-known problems with the functionality of the employment standards and human rights regimes as a whole, real access to substantive workplace standards and human rights protection may be, for all practical purposes, simply unavailable to non-unionized employees.

Finally, it is important to note that passive deregulation can also occur simply through the failure of workplace rules and institutions to reflect the real costs and risks of participation to those actually working in the labour market. As those costs and risks change and grow, in part because of the changing composition and sheer diversity of the workforce itself, the number of vulnerable workers may increase. As discussed later, many women workers carry additional costs at work because of obligations of care to children or other dependents. They also tend to have different career trajectories and patterns of labour force participation than men. This in turn means that they have more difficulty accessing workplace benefits that are linked to job tenure; it may also mean that they require new forms of protection, employment and social insurance, and public goods and services (Supiot, 2001; Auer and Esping-Anderson, 2002). Because of the feminization of the workforce, these cannot be considered marginal or secondary problems; rather, larger numbers of workers now face persistent vulnerability at work because of inadequate institutional and regulatory responses to the intersection of work and non-work obligations.

These are regulatory and policy issues not merely economic problems. Addressing them requires attention not only to labour and employment rules but to employment insurance, pension schemes and the provision of other goods and services. They are also deeply affected

by the general decisions and choices around funding for the monitoring and enforcement of administrative laws.

A good part of the difficulty workers in atypical work relations or those in the service, retail and clerical sectors experience in accessing workplace representation and exercising collective power can be attributed to the specific characteristics of the labour relations system which obtains throughout North America. The Wagner Act regime sets up numerous barriers to effective representation and collective bargaining, the most important of which pertain to bargaining unit determination and the conditions and procedures governing the certification and bargaining processes. There have been numerous proposals to alter representation and bargaining structures to facilitate access to collective bargaining on the part of those who are now excluded, whether because they work in small or dispersed locales, because their attachment to the labour force is tenuous or interrupted, or because they derive their income from more than one employer (Friedman, 1994; Cobble, 1994; MacDonald, 1998). But it is also important to reduce the competition among employers in respect to wages and working conditions; in some low wage markets, some form of sectoral bargaining is almost certainly required if there is to be any realistic prospect of improving the position of workers. A variety of arrangements might be compatible with current collective bargaining law. For example, the decree system in Quebec which extends the benefits of bargaining to unrepresented workers in sectors where collective agreements have become dominant has functioned for a long time, although it too is subject to attack in the current regulatory climate because of concerns about competitiveness (Vallee and Charest, 2001). Even within the Wagner Act collective bargaining legislation, there are craft-based models for managing the complexities of multiple employers and short job tenures; see for example the special provisions for representation and bargaining

in the construction industry in Ontario⁷. But although the deficiencies in respect of access to representation have been explored and documented by labour scholars for some time, recent reforms to labour relations legislation have not, in general, been directed towards addressing the barriers in the certification process; indeed, some reforms have arguably made it more, not less, difficult for employees to obtain certification at all⁸.

B. Core labour rights

Along with the trend toward aligning labour market regulation with efficiency and flexibility goals, there is also a move to revive the independent normative significance of a limited set of ‘core’ labour rights (ILO, 1998; Rittich, 2003); this trend is particularly visible at the international and regional levels. The new focus on core labour rights reflects the increasing use of international human rights norms, arguments, instruments and institutions to address various aspects of the ‘social deficit’ of globalization, and the problems of poverty, inequality and insecurity arising from the new economy. As human rights, core labour rights represent a minimum set of worker entitlements that are supposed to be applicable in every context; they are also, in theory, economically uncontroversial (OECD, 2000). While core labour rights represent an effort to reground the normative consensus around the rights and entitlements of workers in the global economy, to what extent the introduction of such ‘soft’ legal norms will actually assist vulnerable workers is uncertain (Rittich, 2003). Although core labour rights include anti-discrimination norms and freedom of association and the “effective recognition of the right to collective bargaining” (ILO Declaration, 1998), they are expressly promotional in nature, and there remains a great deal of resistance to treating them as *legal* entitlements that should be institutionalized and enforced (Rittich, 2003). They cover only a limited number of rights in any

⁷ *Labour Relations Act, 1995*, S.O. 1995, c.1, Part IV – Construction Industry.

⁸ *Economic Development and Workplace Democracy Act, 1998*, S.O. 1998, c.8, ss.1-23; *An Act to amend the Labour Relations Act, 1995, 2000*, S.O. 2000, c.38, ss.1-38.

event: they are explicitly designed to exclude labour standards and other substantive rights that might impair comparative advantage in trade (ILO, 1998).

In addition, the force of international labour and human rights norms in the field of work remains a question mark in Canada. While the Supreme Court now takes increasing note of international norms in its decision-making processes⁹, it has long declined to conclude that specific legal or institutional entitlements such as the right to strike or access to general collective bargaining legislation follow from the constitutional entrenchment of worker's freedom of association¹⁰.

The relatively weak protection workers receive through international and constitutional rights should be juxtaposed to the countervailing international trends towards ensuring more extensive 'hard' rights for investors and entrepreneurs through bilateral and multilateral trade and investment treaties; unlike core labour rights, these are now institutionally enshrined¹¹. Not only are they enforceable entitlements; as some commentators have observed, international agreements increasingly seek to ensure that investor property and contract rights approach 'constitutional' status (Schneiderman, 2000). It is important to consider how such rights might intersect with efforts to reduce vulnerability and empower workers in the current economy. For example, the entrenchment of investor property and contract rights under chapter 11 of NAFTA potentially restrains responses at the national and provincial levels to a variety of workplace problems, as such rights grant non-national investors the power to challenge policy or regulatory changes that increase the costs of operating undertakings or impair the future income streams

⁹ See for example, *R. v. Advance Cutting and Coring Ltd.*, [2001] 3 S.C.R. 209.

¹⁰ *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367.

¹¹ See for example *North American Free Trade Agreement*, c. 11, online: <<http://www.nafta-sec-alena.org/english/index.htm>>.

of owners¹². Among the regulations targeted so far under chapter 11 are environmental standards; however, occupational health and safety standards raise similar issues and, along with other workplace standards, could also be the subject of a chapter 11 challenge.

The trend toward regulating for labour market flexibility and ensuring core labour rights for workers are distinct regulatory strategies. Yet although they are associated with different constituencies and emphasize different goals and objectives, there is also overlap in the approaches. One of the places that they converge is in the emphasis placed on various forms of worker participation and process rights on the one hand and the diminished reliance on substantive entitlements for workers on the other. Consistent with the both entrepreneurial model of work and a focus on core labour rights, where workers do see enhanced legal entitlements, they now tend to be in respect of their individual rather than collective rights. Workers in many countries have access to new forms of anti-discrimination rights due either to judicial decisions or legislative action, even as collective bargaining and other workplace entitlements are actively and passively eroded (Hepple, 2002). For example, in Canada, there is now a broad conceptual framework with which to challenge discriminatory workplace practices and expanded access to remedies under recent human rights decisions of the Supreme Court¹³. However, constitutional recognition of the collective rights of workers remains tightly circumscribed, as the Court continues to sharply distinguish the protection of workers' freedom of association from the protection of any of the collective activities for which workers traditionally organize.

The precise relationship between flexibility and core labour rights strategies and the division of labour between them remains in question. As regulatory trends or strategies, are they in conflict

¹² See for example, *Mexico v. Metalclad Corp.* (2001), B.C. J. n° 950, May 2, 2001.

¹³ *B.C. v. B.C.G.S.E.U.*, [1999] 3 S.C.R. 3 ("Meiorin").

or are they complementary? If they are complementary, which regulatory questions are matters of workers' 'rights' and which are questions of employer 'flexibility'? Who determines how they are classified, and on what basis? What are the implications for those engaged in vulnerable work of these exercises in categorization and the allocation of entitlements that results?

C. Changing regulatory norms: Assessing the shifts

The current emphasis on labour market flexibility on one hand and the protection of core labour rights on the other reflects changes in how we think about, and argue for, labour market regulation. A number of shifts relevant to the position of vulnerable workers can be identified. First is a radical change in the arguments about what labour market regulation is *for*. Basic anti-discrimination and associational rights aside, labour market regulation now tends to be conceptualized as a question of *economic policy* rather than a question of the worker *rights and entitlements* (World Bank, 2001; Courchene, 2002): rather than the frame in which economic activities are conducted, worker rights are now instrumentally evaluated in terms of their contribution to efficiency. The legal rules and policies governing work have traditionally served a variety of social and economic functions; foremost among them are altering the balance of power between workers and employers, redistributing risk and resources among workers, and establishing basic terms and conditions of work. As economic rationality comes to constitute the metric by which the legal protections and entitlements of workers are evaluated, these other functions are displaced. The shift to the efficiency frame is significant: the risk is that it will delegitimize and undermine labour market rules, institutions and policies that serve distributive and other normative objectives unless they *also* persuasively and demonstrably serve the ends of efficiency and growth.

Second, the emerging entrepreneurial or 'partners in production' norm represents a changed view of the *alignment of worker and employer interests*, one that diminishes recognition of the specific risks to workers in labour markets and the role of power in the employment relationship. This shift is most visible in contrast to the regimes and paradigms that now regulate work. The *unitary model* informing the common law rests upon the subordination of the employee to the employer's interests and control in exchange for a certain degree of security and protection at work; it also presumes a common interest between employers and employees in the context of work. The *industrial pluralist model* underpinning collective bargaining law in North America, by contrast, presumes the presence of conflicting interests between employers and employees: it is based upon the idea that workers will systematically get the short end of the stick in employment bargains unless the characteristic imbalance of power between workers and employers is redressed through legislative intervention enabling collective bargaining. Employment standards legislation is also a response to the power differential between workers and employers in the market for labour; however, it addresses the problem by placing a floor under the employment contract in the form of substantive contractual terms. The *entrepreneurial model* by contrast assumes away both the goals of worker protection and security, except through the enhancement of human capital and skill, *and* the problems of conflicting interests and disparities in power between workers and employers. Modeled on the idea that economic success lies in a harmonization of interests between employers and workers, it seeks to analogize employment relationships to commercial contracting relationships in which workers and employers are 'joint venturers' in search of productivity and profitability.

Although the entrepreneurial model may approximate the nature of work relations in the new economy in the case of well-positioned employees (Hyde, 2003) – those who have never been the object of employment standards and collective bargaining laws in any event – the extent to which it applies to other workers seems doubtful. Labour markets regulated only by employer

property and contract rights have historically been a source of vulnerability and disempowerment rather than security for workers; the question is whether, and why, we should expect that they will entail more actual or substantive freedom and security for workers at the current moment than they have in the past. It is important to recall that, despite the current emphasis on cooperation over conflict in production, because of these legal entitlements, employers still retain ultimate control over the direction, organization, even the existence, of work in the new economy. Whatever their force, norms stressing the need to harmonize worker and employer interests for success risk obscuring the extent to which the interests of labour and capital continue to diverge *as a matter of law*. Moreover, the role of law in constituting the interests of workers and employers is not merely a matter of the absence or presence of employment standards or rules enabling collective bargaining. Under corporate law, for example, workers are treated as outsiders to the firm, something that provides a powerful inducement to firms to ignore or impair the interests of workers as they attend to the demands of insiders, shareholders who generally reward their efforts to reduce labour costs. Thus, any move to harmonize relations between workers and employers without impairing workers' security would seem to require attention to the structure of corporate law too (Bernard and Deakin, 2002)

Despite the fact that enhanced labour market flexibility is commonly referred to as labour market 'deregulation', flexibility does not represent, and is not intended to lead to, an absence of law or state power the employment relationship. Although flexibility arguments are linked to the idea that success in the new economy requires less state presence and oversight, labour market 'deregulation' is better described as 'reregulation': it involves a realignment of state power and a redistribution of entitlements among workers and employers, resulting in a legal framework in which workers' entitlements are eroded and those of employers become correlatively more significant in structuring the employment relationship. Although economic forces matter too, this

redistribution of entitlements affects the allocation of risks and costs in production and helps determine the rewards that accrue to the participants. Thus, flexibility norms diminish the extent of workers' 'countervailing power' at the very moment when the imbalance of bargaining power between most workers and their employers has already sharply increased due to economic and technical changes (Klare, 2000). For these very reasons, 'deregulatory' strategies are likely to increase the numbers of vulnerable workers; they may also enhance the job, employment and income insecurity experienced by many who might fall outside the category of vulnerable workers.

D. Knowledge, flexibility, and human capital: Regulatory issues

Human capital is increasingly identified as a central component of success in a flexible, 'knowledge-based', globalized economy. The advocates of labour market flexibility propose that the interests of workers now lie not in labour market rules and institutions but in skills training and continual adaptation to the changing demands of the market. However, even if they are buttressed by core labour rights, such suggestions do not respond to many of the most obvious risks and eventualities, ranging from loss of employment, variation in income, and redundancy in skills, that workers can expect to encounter in a newly volatile economy; nor do they provide explanations as to how the 'old' risks, illness, disability, and loss of income from obligations of care – are to be managed. More fundamentally, the actual policy and regulatory implications of the rise of the knowledge-based economy and flexible modes of organizing work and production remain uncertain and deeply contested rather than known and obvious. These debates and uncertainties are crucially important to the question of vulnerable work in the new economy.

Current 'deregulatory' models rest upon a set of assumptions and theories about what contributes to the competitiveness of firms and the growth of economies as a whole: detailed

regulatory changes are prescribed based on theories about the efficiency effects of legal rules and institutions. However, rather than certainty, there is an enormous amount of conflict about these very assumptions. There are starkly opposing economic accounts of the role of labour market rules and institutions in the competitiveness of both firms and economies. Critiques of neoclassical economic assumptions about the operation of labour markets have long been available on both theoretical and empirical grounds (Hirschman, 1970; Freeman and Medoff, 1984; Solow, 1990). For example, there are persuasive accounts, many of which are rooted in institutional economics, about the extent to which labour market standards and employment protections can contribute to, rather than detract, from labour market efficiency (Deakin and Wilkinson, 1994). These arguments and explanations have considerable purchase in contemporary debates over labour market transformation in Europe (Supiot, 2001; Auer and Gazier, 2002). Even if labour market flexibility remains a central goal, it can be understood in a variety of different ways (Fredman, 1997). As the current debates around 'flexicurity' in Europe disclose (Blanpain, 2002), arguments for greater flexibility can militate in favour of enhanced legal entitlements for workers too¹⁴. The upshot is that a large number of labour market rules and social policies arguably contribute in crucial ways to the maintenance and support of human capital and thus contribute to competitiveness in a knowledge economy. Thus, rather, than dismantling labour market institutions, what may be crucial in the new economy is revising and reforming them.

It seems relatively clear at this point that, rather than simply labour market deregulation accompanied by the recognition of a few core rights, a range of responses may be needed to actually operationalize a knowledge-based economy in which most people, for the duration of their working lives, can realistically ensure their economic security and well-being through

¹⁴ See the recently enacted *Employment Act 2002*, (U.K.) 2002, c. 22, in the United Kingdom which entitles workers to some degree of flexibility in working hours. Online: <<http://www.hmsso.gov.uk/acts/acts2002/20020022.htm>>.

labour market participation (European Commission, 1999). Such responses include the obvious – enhanced spending on education, skills and training – but extend to issues such as child care and early childhood education, health and home care, welfare and social protection, housing and many others that in North America, with the important exception of Quebec, have traditionally been regarded as either peripheral to the question of work or simply ‘private’ concerns.

E. Regulation at work: Key sites and concerns

As the discussion of human capital suggests, a wide range of regulatory and policy concerns may be implicated in the production of and response to vulnerability at work. For example, as a consequence of increased labour migration in the global economy, citizenship, immigration status, and other issues of legal status may also be implicated in the vulnerability and economic security of growing numbers of workers. Moreover, workers in Canada may be affected by trends and decisions elsewhere. In a globalized world, the regulatory calculus needs to shift outward. If domestic workers are inevitably affected by global processes, and if growing numbers of workers have attachments to more than one jurisdiction, then it seems important to think about the external as well as the internal effects of policy and regulatory choices. One of the challenges is to find ways to recraft security for workers at home that do not disadvantage, and that may even assist, workers beyond our borders.

At the present time, improving prospects for vulnerable workers requires attention to a number of key sites, issues and trends.

i. Rethinking employment

As the literature on self-employment and contingent work discloses, one of the central problems in the new economy is that, as a consequence of the legal distinctions between workers who are employees versus those who are classified as independent contractors, employment standards and trade union representation and collective bargaining are not available to many of the most vulnerable workers. For this reason, there is overwhelming consensus among labour scholars that access to labour and employment protections should no longer be limited to employees, certainly as the category has traditionally been defined (Davidov, 2002; Fudge et al, 2002). Thus, a threshold question is where, and when, the employment relationship remains the appropriate vehicle for delivering workplace protection and income security for workers (Langille, 2002).

However, the transformation of work raises more fundamental questions about the categories and assumptions that we use to regulate work and protect and empower workers. Although many forms of social benefits and protections have traditionally been delivered through work, to the extent that workers' attachment to the workplace or even particular sectors is attenuated, it becomes more important to think of alternative bases and modes of ensuring economic security and self-sufficiency for workers. In a world of increasingly unstable and short term work relationships, the focus may need to shift to the protection of occupational status and compensation for time spent out of the labour market on tasks such as training and unpaid domestic work (European Commission, 1999); the recognition of social rights that are not linked to work but are simply incidents of citizenship; and/or the extension of basic human rights and entitlements that are available to all without respect to civil status.

ii. Representation at work

Both the workplace and the economy are being re-organized at a moment of unprecedented weakness in worker representation and voice. Legal reforms to enable and promote new forms of worker representation are crucial to improving the status of workers in the new economy, particularly the most vulnerable workers.

The lack of voice has significant consequences for workers at two levels: the workplace and the legislative/political arena. In the workplace, the failure to introduce new voice mechanisms and to ensure access to union representation to workers in non-standard forms of work and in sectors badly served by existing collective bargaining law leaves many of the most vulnerable workers with no means of bargaining collectively over the redistribution of risks and rewards or influencing the re-organization of work. This 'representation gap' contributes to the downward pressure on wages and working conditions and increases economic and other forms of vulnerability at work.

This weakness at the bargaining level is reinforced by the weakness of workers at the political level. One of the results of the asymmetrical power of workers and capital in the new economy is that employers tend to have privileged access to the mechanisms of policy and regulatory reform and a great deal of influence in charting the direction of reforms. Workers' capacity to effect regulatory change has been correlatively weakened; this weakness is exacerbated by declining rates of unionization that reduce the status and influence of trade unions in regulatory and policy debates. This influence deficit is likely to exacerbate the disadvantage of workers in the course of restructuring and industrial transformation, resulting in legal and policy reforms that intensify the advantages of employers rather than ameliorate the disadvantages and risks

of workers. Thus, some of the very forces which produce greater vulnerability at work inhibit the regulatory and policy responses that might address it.

In addition, it is now clear that workers are not a unified 'class'; rather, they have diverse interests and needs in the workplace and with respect to labour market regulation and social policy, interests and needs that do not always coincide and that sometimes conflict. This too may complicate responses to labour market vulnerability. While workers have many issues and interests in common, workers may not always speak in a single voice. Moreover, the demands of the most vulnerable workers are those that are mostly likely to be missing from the debate, in part because union and other forms of representation are absent or weak. Representation structures that adequately reflect the spectrum of worker demands differences are currently undeveloped; some forms are expressly precluded under the Wagner Act regimes by the requirements that trade unions have exclusive rights to representation. For all of these reasons, it is important to be attentive to the fact that: 1) workers' interests are likely to be systematically under-represented, and 2) existing forms of worker representation are unlikely to adequately reflect the claims and interests of many of the most vulnerable groups of workers.

To the extent that they are involved in transnational production, workers may also have an interest in the outcomes of labour disputes elsewhere (Hepple, 2002). However, there are now limits on transnational solidarity efforts among workers, due to legal constraints on the use of 'secondary action' in industrial disputes in North American collective bargaining law (Atleson, 2002). In a context of globalized production, such restraints effectively tilt the field in favour of employers still more. Thus, addressing the representation gap is likely to require efforts to facilitate cross-border representation and collective action by workers or, at minimum, removal of the current regulatory barriers to such representation and action.

iii. Toward process, participation and decentralization

Beyond the basic issues of access to employment standards and workplace representation lie a number of enduring regulatory questions. One is whether, and where, process and participation rights can substitute for the erosion of substantive entitlements, especially where vulnerable workers are concerned; another is who bargains together. The case for reducing or eliminating substantive workers rights rests on the presumption that bargaining over issues at a decentralized level will produce workplace standards that are more responsive to both employer flexibility concerns and the real concerns of workers in the workplace. However, whatever its merits from the standpoint of flexibility, the replacement of substance with process rights immediately raises issues around disparities in bargaining power between workers and employers (Hepple, 2002). Decentralization generally weakens labour standards. While this is a concern for all workers in the current context, it is a particular problem for the most vulnerable workers. Those who are easily replaced in the labour market cannot always expect to see measurable gains even in collective negotiations with their employers; their best hope may still lie with legislated entitlements (Beatty, 1984) or with joining forces with others beyond the immediate workplace. Hence, it matters whether work standards are the result of legal entitlements or merely the product of bargaining, and it matters at what level the bargaining is conducted. And as the quite different scenarios in Canada and the United States disclose, the outcomes from bargaining *also* depend on the parties' legal entitlements in the course of representation drives and collective bargaining (Weiler, 1984; Weiler, 1990) and the extent to which they are enforced (Human Rights Watch, 2000). If employment standards are loosened or representation and collective bargaining entitlements weakened, the most vulnerable workers can expect to bear greater risks and see lower levels of compensation.

Any move to decentralize the generation of workplace norms and standards will increase the *variation* in such norms in any event. This is important not only because of the question of bargaining power in individual workplaces, but because it will have ramifications well beyond the workplace. One result may be to exacerbate workplace and labour market difficulties for some groups of workers. For example, the destandardization of working time may intensify the conflict between work and non-work obligations, introducing new childcare costs or effectively foreclosing some work opportunities for workers who face such constraints.

There also may be important consequences from a change in the *orientation* of labour market flexibility. Any regulatory strategy based on individual rights at the expense of collective rights raises the following fundamental questions with respect to workplace vulnerability. Is it possible to effectively empower individual workers in the new economy without empowering workers, or while actively disempowering them, collectively? Moreover, is it clearly desirable, even from the standpoint of efficiency? As the literature on 'learning by monitoring' suggests (Sabel and Piore, 1984; Bruton and Fairris, 1999), skill may be a collective as well as an individual asset. Thus, focusing only on the capital of the individual worker may neglect critical dimensions of the processes by which skill is accumulated and successfully deployed in the new world of work.

IV. Equality, Vulnerability and Human Capital

Vulnerability at work is often related to workers' situation outside of work and/or the operation of social and cultural biases and norms at work. Regulatory prescriptions that focus only on economic efficiency narrowly understood will be incapable of responding to these forms of workplace vulnerability and disadvantage. Rather, legal rules and policies are needed to

address a range of non-market 'externalities' and concerns, many of which are traditionally viewed through the lens of equality.

A. Equality and competitiveness

Equity concerns have traditionally received short shrift in contemporary governance debates, especially those that emphasize the importance of regulating for efficiency (Williamson, 1993; Standing, 2000). But for both political and economic reasons, inequality has once again moved back onto the economic agenda (Kanbur and Lustig, 1999). Much of the revived interest in equality emanates from the recognition that, in the real world, equality and efficiency are not separate concerns but are integrally connected.

In tandem with the new recognition of the 'social' or human dimension of economic development, there is a trend, visible both nationally and internationally, to figure equity and competitiveness as complementary objectives (World Bank, 2001; Courchene, 2002). There are also new 'market-centered' equality strategies, for example gender equality strategies, that offer alternatives to rights-based approaches to equality (World Bank, 2001). An important part of the link between equality norms and competitiveness is through human capital. The argument goes as follows: if we are truly in a knowledge-based economy, then eliminating discrimination, cultivating the human capital of every potential worker and mobilizing the best uses of such capital have to be part of the strategy of regulating for competitiveness. For example, there is now growing income inequality among workers due to the increasing returns to skill (and the economic penalties for lack thereof) in the new economy. An emphasis on human capital is

offered as a way to help reverse this trend, by discouraging 'dependency'¹⁵ (and the strain on public resources) and bringing back in workers who would otherwise be excluded from the new economy due to lack of relevant skills and capacities.

The focus on human capital is likely to become an important element of the analysis of workplace vulnerability; the legal, institutional and policy elements of human capital formation are clearly now central issues. However, there are also concerns that may be eclipsed in discussions about human capital, and there are remaining conundrums around workplace vulnerability that a human capital focus does not touch.

As described earlier, it is doubtful that unskilled labour can simply be eliminated, even within industrialized economies. This is not merely a problem of 'mcjobs': even knowledge-intensive industries produce a great deal of insecure, poorly compensated work. Indeed, the proliferation of low-skill, low-wage service work along with high-skill work appears to be an entrenched phenomenon in the industrialized centres of the global economy (Sassen, 1996). Although one claim is that in a knowledge economy, "social policy becomes ... progressively indistinguishable from traditional economic policy" (Courchene, 2002), the unfolding map of work, with its starkly opposed good and bad jobs, makes it unsafe to assume that social concerns can be simply collapsed into economic ones, certainly as they have been conventionally understood and pursued. Vulnerability in the labour market is not simply a function of low levels of individual skill and training, nor, contrary to the current narrative, is the economic vulnerability which comes from low income a function of the 'merit' or productivity of the individual worker, objectively defined. Rather, job and income (in)security are also products of bargaining power; bargaining

¹⁵ For a genealogy and critique of the idea of dependency in public policy in the Anglo-American world from the standpoint of gender equality, see Nancy Fraser and Linda Gordon, "A Genealogy of 'Dependency': Tracing a Keyword of the U.S. Welfare State" in Nancy Fraser, ed., *Justice Interruptus: Critical Reflections on the "Postsocialist" Condition* (New York and London: Routledge, 1997).

power is a cultural, legal and political construct as well as an economic 'fact'. For such reasons, in addition to the investments in public goods and expenditures of resources that support human capital, addressing worker insecurity is likely to depend on entitlements and policies that enhance the voice and power of workers. However, these are not yet squarely in the basket of 'good' economic policies.

Because not all forms of workplace vulnerability are likely to be solved by attention to the human capital of individual workers, it is important to think about both the *possibilities* and the *limits* of a human capital strategy for labour market regulation. This involves analyzing in concrete ways the effects of the policy and regulatory changes that a human capital analysis is perceived to support, and being alert to the possibility that efforts to enhance productivity may also introduce disadvantages in the workplace for some groups of workers. Thus, a human capital strategy may raise as many questions as it answers. For example, if compensation and income security are increasingly based on the productivity of the individual worker, the result will be increased wage dispersion and greater income insecurity for those at the bottom. It is also likely to worsen the position of those workers, predominantly women, with non-market constraints on their working time. In other words, it will produce greater wage inequality and generate disadvantage for particular groups, whether or not it actually produces greater growth. The tradeoff should be acknowledged and addressed: if we encourage greater productivity via such routes, is the intention to simply tolerate the losses, or do we have plans for redistributing the costs and benefits of reforms?

A complicating factor is that significant numbers of vulnerable workers are not merely disadvantaged on the basis of skill or experience: rather they experience some form of systemic discrimination at work. Labour markets and workplaces are routinely stratified, horizontally and vertically, along racial, ethnic, gender and other lines (Kunz et al., 2000). Here, as elsewhere,

such 'differences' are not equal: they tend to mean significant disparities in income, workplace opportunity and bargaining power and either distinct or intersecting forms of vulnerability at work. Because workplace disadvantage is intimately linked to social and political exclusion, the persistence of discrimination at work compels serious attention, especially in light of the growing racial and ethnic diversity of the population and the recent evidence that poverty among immigrants has risen markedly (Statistics Canada, 2003). This is a regulatory issue. All arguments to the contrary (Becker, 1970), markets do not eliminate discrimination on their own, nor do human capital strategies necessarily solve for such concerns. Rather, as pay and employment equity legislation recognize, structural and systemic discrimination are *definitionally* unrelated to differences in skill, effort, responsibility and working conditions and are thus not amenable to 'market' solutions.

Discrimination can occur *directly* on the basis of personal or social characteristics. However, eliminating discrimination is not simply a question of ensuring access and mobility for all workers in labour markets and workplaces. As is now recognized by the courts, disadvantage and insecurity at work can also arise *indirectly*, because of the differences in the capacity of workers to conform to established or emerging workplace norms whether or not those norms are related to skill and effort or even to the 'real' requirements of the job¹⁶. These norms determine the extent to which people can participate in labour markets and the quality of that participation: those who are willing and able to conform to those norms are often advantaged relative to those who cannot.

¹⁶ *Meiorin, supra*, note 13.

B. Remaking market norms

Equality norms and rules may respond to some but not all disadvantage and vulnerability created by workplace norms. Whether they do or do not depends on whether they touch the more general issue: the conception of the normal worker and the normal workplace in the emerging economy. The legal regulation of work and the structure of social protection play important roles, directly and indirectly, in producing and maintaining workplace norms. In so doing, they both reflect and produce expectations about the normal worker, his or her capacities, needs, risks, and preferences.

Thus, workplace norms are directly relevant to the question of disadvantage and vulnerability at work. For example, older workers may be disadvantaged by norms that require full-time work in order to keep a job. Women workers often have career trajectories that differ from those of the average male worker and suffer disadvantage as they move in and out of the labour market: their skills may become eroded or redundant, or employers may ignore the relevance of non-market activities to market skills. Young people may have difficulty entering the labour market for the first time; immigrants may find that their training and experience is devalued for no obvious reason; and those who are unemployed, especially for any length of time, may see their human capital eroded. These transitions tend to be points of acute vulnerability for workers (Auer and Gazier, 2002). Thus, addressing vulnerability requires assessing workplace norms; determining how different groups are situated in relation to them; figuring out how legal institutions affect their evolution both directly and indirectly; and evaluating the possibilities of using legal strategies to steer workplace norms in ways that are more compatible with equality and security for various categories of workers.

Given the enormous interest in policies and institutions to enhance competitiveness, it is important to identify the overlap of human capital strategies with those that address various forms of workplace insecurity, including those that arise from discrimination or simple deviation from the norm. However, it is important to recognize that they may not always coincide; the United Nations Development Program, for example, would sharply distinguish its 'human development' approach from the 'human capital' approach adopted by the World Bank. Whatever the agreement about its importance, there remain important disagreements about the nature of equality and the strategies to achieve it; compare, for example, the approaches to gender equality of the World Bank, 2001; the ILO, 2003; and the decision of the Supreme Court of Canada in *B.C. v. B.C.G.S.E.U.* ("Meiorin"). Whether they converge or diverge in 'in the long run', there remain *perceptions* that regulating for equality in labour markets undermines efficiency and that there are tradeoffs to its pursuit even among those analysts and institutions who support a high-skill road to growth (ILO, 2003; Courchene 2001). Such fears are an important part of the resistance to regulatory and policy solutions that address vulnerability at work. For example, pay and employment equity legislation are frequent deregulatory targets, on the theory that they are 'market distorting' and bureaucratically cumbersome, harm the groups they are intended to assist, or simply cost too much¹⁷; remedies for systemic discrimination by courts are subject to attacks for these and other reasons. However, there are cogent explanations about how normal workplace practices operate to the detriment of particular groups. Hiring and promotion, for example, are often conducted in ways that benefit insiders or those who have some link to job networks and function to limit the pool of prospective candidates in some way. The Supreme Court has long accepted the equality arguments and crafted remedies to alter such entrenched, structural features of the workplace¹⁸. These arguments have not lost any of their force in the new economy; indeed, to the extent that such

¹⁷ *Service Employees International Union, Local 204 v. Ontario (Attorney General)*, (1998), 35 O.R. (3d) 508.

¹⁸ *C.N.R. v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114.

practices lack any economic justification, they may be more persuasive. Whether specific remedies and institutions should be retained in their current form may be in question.

But whether discrimination and labour market disadvantage will continue if such remedies and institutions are simply eliminated in the name of efficiency and market forces left to operate without some countervailing change is not.

Getting past this impasse and pursuing equality and competitiveness in tandem requires a greatly expanded idea of what now inhibits equality and participation in markets and what could in the future contribute to human capital formation and growth. If equity and competitiveness are now complementary regulatory goals, then a number of questions need to be addressed.

One of the things that a focus on vulnerable workers discloses is that 'deregulatory' prescriptions routinely fail to trace the total flows of burdens, risks and resources that deregulation implies. While they focus on the most visible costs of labour and employment regulations *inside* the market, they typically stop short of assessing the costs imposed *outside*, for example upon households, the state, the voluntary sector or society at large. Although some of these costs may be invisible in the policy calculus, they remain real; moreover, they may affect economic outcomes because of their effect upon the capacity of workers to participate in the labour market. The result is that 'efficient' regulation, rather than enabling aggregate gains or a better allocation of resources, may simply redistribute resources and risks from firms and employers to other parties such as the state or workers. Thus, what looks efficient from one standpoint may look costly from another. In addition, the costs and risks of 'deregulated' work tend to be imposed unequally on different groups of workers; this is a particularly significant issue in respect of labour market equality for women. Hence, whatever policy and regulatory choices are adopted, for equality reasons it seems clear that greatly expanding the balance sheet in respect of efficiency has to form part of the strategy for addressing insecurity at work.

Finally, it is important to recognize that a human capital strategy focused on economic growth and the potential contribution of rules, institutions and policies to that process does not necessarily respond to the values of solidarity, equality and distributive justice. The legal regulation of the employment relationship, however, has never been solely, or even primarily, about enhancing the efficiency or functionality of labour markets (Deakin, 2001). This does not, to repeat, mean that the rules and institutions governing the employment relationship are necessarily inefficient. They may contribute directly to the productivity of firms. They may contribute to the social solidarity and economic and political stability that grounds long-term growth; they may preserve human capital, both in the long and short term. Nonetheless, they have traditionally been about fairness, democracy and distributive justice in the workplace; they are designed to correct for disparities in power and resources between workers and employers and among workers themselves, and to ensure basic levels of well-being within society at large. It is increasingly clear that the diminished power of workers in the employment relationship, and the diminished job, income and employment security for workers that results from that loss of power, is linked to increasing worker vulnerability in the new economy. In such circumstances, any displacement of distributive concerns seems misplaced. In light of the interconnection between equity and efficiency concerns, it may also be counterproductive.

It is also worth recalling that, while they are typically articulated in the language of efficiency, objections to rules and institutions whether old or new, that are designed to address vulnerability at work may simply reflect resistance to reform. This should be expected: labour market regulation is a social and political as well as an economic question and it inevitably involves conflict over the distribution of resources and power. But such objections should not be equated with concern about efficiency. While employers have often claimed that they cannot afford higher labour standards, whether this is a fact, rather than an argument, cannot be simply assumed, even amidst the pressures of economic integration. And for the reasons discussed,

whether something is efficient or not is an issue that is much more complicated than whether it is immediately beneficial to firms or employers either individually or as a group.

It is worth underscoring the risks to workers in strategies that are designed to enhance productivity, and to point out that these apparent efficiencies too may involve displaced costs rather than simply net gains. Workplace stress is a growing health concern; the amount of time devoted to work crowds out time spent on non-market activities. If improving efficiency is understood as working more and harder to ensure labour market success, security, even survival, we should also expect costs to workers, their families, the wider social fabric and the future health of the economy. Not only will social life be subordinated to market forces, the weakest workers will be systematically disadvantaged.

C. Workplace feminization

As suggested in the foregoing discussion, the feminization of the workplace raises a host of questions around workplace norms, the allocation of risks and costs among workers and other social actors and institutions, and their connection to workplace vulnerability. For these reasons, it is worth considering the issue directly.

To reiterate, the regulation of the workplace presumes and reflects a stylized set of worker risks, needs and demands. The 'normal' worker is envisioned as a male head of household with continuous, long-term participation in the labour force who has no substantial non-market obligations. For a variety of reasons, the factual underpinning of this norm has now been seriously eroded, creating a number of regulatory gaps. Among the most significant is the failure to adjust workplace and other norms, rules and institutions to better reflect the specific needs, costs and risks faced by an increasingly feminized workforce.

It is not accidental that women form a large contingent of those in unregulated, unprotected and vulnerable work: their disadvantaged status at work is often connected the presence of non-market obligations, the limits those obligations place on labour market participation, and the failure to adequately reflect those obligations in workplace rules and norms. The widespread feminization of work, including the labour market participation of the majority of women with very young children, raises important questions about the intersection of market and non-market work (Rittich, 2002a). Single mothers remain among the most vulnerable members of the labour market; an important source of this labour market disadvantage is the unpaid work burdens that women carry (Elson, 1999). Given the centrality of these factors to vulnerability at work, there are key regulatory and policy issues around the connection between labour market and unpaid work.

It is now well-recognized that all economic activity is dependent not merely upon 'productive' work in the market, but also upon the performance of unpaid domestic or 'reproductive' work (Elson, 1999). Unpaid labour is a crucial source of human capital, an important part of securing and sustaining the labour force as well as well as ensuring social reproduction. To the extent that its contribution to economic activity is discounted or ignored, the costs attached to the performance of unpaid work are 'externalized' by employers and borne by individuals, usually women, households, or the state (Supiot, 1999; Rittich, 2000b).

Despite the entry of most women into the labour force and the claims that this will change as a result (World Bank, 2001), the distribution of unpaid work remains distinctly gendered. This has the effect of imposing a 'tax' on women for labour market participation (Palmer, 1995) – an equality concern – and/or reducing the extent of women's market participation – a human capital and productivity concern. It also creates disparities between men and women in leisure time. Moreover, the failure to both accommodate and compensate the labour involved in obligations

of care appears also to contribute to the 'crisis of social reproduction': this is the systemic incapacity to both reproduce, and to account for the true costs of reproduction, that has emerged as a pressing social problem across the industrialized world (Esping-Anderson, 2002).

The current preoccupation with finding a 'work-life' balance and implementing 'family-friendly' policies speaks to the difficulty of participating without insecurity and disadvantage in a work world structured around the assumption that someone *else* does the unpaid work. What should be emphasized is that legal regulation *itself* contributes to the creation of unpaid work, the division of labour between men and women, and the allocation of costs and responsibilities among different social institutions for the support of reproductive work. A wide range of legal rules – from employment standards regarding working time, equality norms determining what constitutes workplace discrimination, tax regulations concerning the deductibility of child care expenses to social assistance entitlements, education policy determining the length of the school day, and health and home care costs and availability – structure workplace norms and create incentives and disincentives to market participation. Through the allocation of risks and entitlements, they make it more or less difficult to accommodate both paid and unpaid work obligations; they also provide, or fail to provide, compensation and cross-subsidies to those with obligations of care. In short, legal rules help to determine what is in the end a movable boundary between market and non-market time and space and compensated and uncompensated labour (Rittich, 2002b). Thus, the legal and policy issues around non-market work represent a crucial site at which a highly significant and interrelated set of issues around workplace vulnerability, equality and the enhancement of human capital and productivity intersect.

Conclusion: Questions to Consider

The analysis of vulnerability at work is a project that can, and should, be conducted at a number of levels of abstraction and specificity. However, a number of general observations can be made. In light of the deep interconnections among legal rules and the diffuse effects of a wide range of policy efforts and external events on the transformation of work and the status of workers, it is unlikely that the problem of vulnerability at work can be successfully addressed without a commitment to analyzing it systematically in the wider regulatory and policy context.

Despite the tendency to formulate model rules, practices and institutions to govern the economy, especially as an incident to 'good governance', there cannot be any single, fixed approach to labour market rules and policies or to solutions to the problem of vulnerable work. It seems clear that labour market flexibility norms may increase the extent of vulnerability for workers. However, neither a focus on vulnerable work nor a focus on flexibility and human capital necessarily implies a single, or obvious, set of strategies, rules or policies. Moreover, a focus on human capital is not necessarily the same thing as promoting workplace flexibility, at least as currently conceived. Although their precise form and nature is now in question, there remain powerful arguments, economic and other, for the retention and/or implementation of a range of legal rules and institutions that empower workers, redress workplace discrimination and respond to the diverse forms of worker vulnerability. A central reason is their role in allocating risk, reflecting the real costs of economic activity, redistributing the gains and losses of economic transformation, and ultimately sustaining the productivity of the economy as a whole.

Thinking through the nature and sources of human capital in conjunction with the imperatives of flexibility suggests a range of policy and regulatory responses other than those often associated

with the new economy, that is, regulation to empower employers. Thinking through flexibility, the demands of human capital and the problems of disadvantage and persistent vulnerability together is likely to shift the policy and regulatory calculus yet again. The foregoing discussion suggests a number of questions that should inform the analysis of these issues.

- How do we imagine the ‘normal’ or ideal worker in the course of policy and regulatory reform? *Is there still a normal worker?* What assumptions can we safely make about his/her characteristics, needs, risks, access to labour markets?
- What sorts of differences matter at work? What kinds of disadvantage are attached to them? Are they, in whole or in part, related to policy and regulatory decisions? How could they be ameliorated by policy and regulatory change?
- Is the particular form of workplace vulnerability we are addressing simply a ‘work’ issue? Or is it related to other issues such as position in the household, or advantage and disadvantage on other social and cultural grounds? If so, how does that affect our approach?
- When does vulnerability at work overlap with human capital concerns as conventionally understood, for example, skill, education and experience? What are the possibilities of addressing them simultaneously? How would we measure success or failure? Who should pay, and why?
- When does responding to vulnerability at work require rethinking our understanding of human capital? What do we think or know about the sources and determinants of human capital? Are these sources ‘fixed’, or are they open? What is currently, or commonly, excluded that should be added to the list? Who or what institution, for example individuals, households, firms, the state, provides the ‘inputs’ to human capital? At what cost, and to whose benefit?

- When does responding to vulnerability at work, either for particular categories of workers or for workers in general, diverge from a human capital agenda? Where is it appropriate to implement rules and policies that channel resources to workers or empower workers, notwithstanding their economic effects? When do economic concerns crowd out other values, objectives and dreams?
- When does responding to vulnerability at work conflict with labour market strategies organized to promote adaptability on the part of workers or policies to enhance the economic prospects of firms? Can we identify policy or regulatory shifts that impair, or are likely to impair, workers job, employment and income security? Which workers? Has the complete range of costs been assessed? Do they include non-market as well as market costs? How do we propose to compensate those who are affected? *Do we propose to compensate them?* If not, what do we think will be the effects, economic and non-economic?

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